e-MANTSHI

A KZNJETCOM Newsletter

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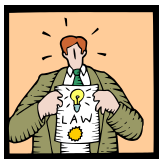
Welcome to the hundredth and fourteenth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is important to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Department of Justice and Constitutional Development invites interested parties to submit written comments on the proposed draft Regulations relating to Sexual Offences Courts, 2015 (the draft Regulations). These draft regulations were published in Government Gazette no 39240 dated 30 September 2015. The Judicial Matters Second Amendment Act, 2013 (Act No. 43 of 2013) amends the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), to enable the Minister of Justice and Correctional Services to (a) designate, by notice in the Gazette, courts as sexual offences courts to deal with sexual offences cases; and (b) make regulations necessary to give effect to the designated sexual offences courts, including the requirements for the efficient and effective functioning thereof. The draft Regulations focus on elements of efficiency and effectiveness of the sexual offences courts. The draft Regulations aim to provide for protective measures for victims to be available at designated courts and also focus on the needs of persons with disabilities. The draft Regulations provide for basic requirements before a court may be designated as a sexual offences court and advanced requirements, which must be realized progressively. One of the

regulations which are of importance to Magistrates is regulation 31 which reads as follows:

Advanced requirements regarding training of presiding officers

31. (1) Subject to regulation 3(5), a presiding officer may only preside over cases involving sexual offences in a designated court if he or she has, after the commencement of these Regulations, received the training referred to in sub regulation (3);

(2) *(a)* The Office of the Chief Justice must compile and keep a list of every judge who has been trained as referred to in sub regulation (1).

(b) The Magistrates Commission must compile and keep a list of every magistrate who has been trained as referred to in sub regulation (1).

(3) Subject to regulation 3(5), the South African Judicial Education Institute established in terms of section 3 of the South African Judicial Education Institute Act, 2008 (Act No. 14 of 2008) must—

(a) develop training programmes for the purposes of sub regulation (1);

(b) develop refresher courses referred to in sub regulation (4);

(c) determine, where applicable, the duration of the training programmes and the refresher courses; and

(d) ensure registration of the training with the South African Qualifications Authority in terms of the National Qualifications Framework Act.

(4) A presiding officer referred to in sub regulation (1) must attend refresher courses as often as determined by the South African Judicial Education Institute.

Recent Court Cases

1. S v JEZILE 2015 (2) SACR 452 (WCC)

Practices associated with an aberrant form of ukuthwala that sanctions abduction and rape are not protected under our law.

The appellant was convicted in a regional magistrates' court on one count of human trafficking, three counts of rape, one count of assault with intent to cause grievous bodily harm, and one count of common assault. The offences were all committed against a 14-year-old schoolgirl. He was sentenced to 10 years' imprisonment on the human-trafficking count; 20 years' imprisonment on the three rape counts (taken together for purposes of sentence); 6 months' imprisonment on the count of assault with intent to cause grievous bodily harm; and 30 days' imprisonment on the count of common assault. Eight years of the sentence for human trafficking, as well as the

sentences imposed for the two assaults, were ordered to run concurrently with the sentence imposed for the rapes. The appellant was 28 years old at the time of the offences and had departed from his residence in the Western Cape for his home village in the Eastern Cape with the specific intention of finding a girl or young woman there in order to conclude a marriage in accordance with his custom. His stated requirements were that the girl or young woman should be younger than 18 years old. He wanted a virgin. According to the appellant the ideal age for his chosen wife was 16 years old. He noticed the complainant and decided that she would make a suitable wife. He asked his family to start the traditional lobola negotiations with the complainant's family. Lobola of R8000 was paid by the appellant to the complainant's maternal grandmother, who subsequently gave it to the complainant's mother. She ran away from her new marital home a few days into the marriage. She was found and promptly returned. The appellant took the complainant to Cape Town by taxi and after their arrival resided with his brother and his wife in their shared home. Although the complainant testified about seven rapes, all of which occurred after her arrival in Cape Town, the appellant was only charged with three rapes. Furthermore, on his own version, sexual intercourse occurred on two occasions. According to the appellant, sexual intercourse took place once before they left the Eastern Cape and once after their arrival in Cape Town. The magistrate, mindful of the cautionary rules pertaining to a single, youthful witness such as the complainant, found her testimony to be both honest and reliable. The trial court also found that the appellant's version of events leading up to the departure for Cape Town was not supported by the objective facts. The appellant raised as one of his defences and grounds of appeal that he was in a customary marriage with the complainant at the time of the incidents. The magistrate was, however, of the view that the matter was not about the practice of ukuthwala or forced arranged marriages and its place, if any, in our constitutional democracy, but was rather about whether the state proved that the accused J committed the offences he was charged with and, if so, whether he acted with the knowledge of wrongfulness and the required intent. On appeal the appellant contended that the approach adopted by the magistrate to the relevance of customary law amounted to a misdirection and that this demonstrated a lack of understanding. Apart from that relating to the two assaults, his essential contention was that the trial court had misdirected itself in not proceeding from the premise that the merits should have been determined within the context of the practice of ukuthwala, or customary marriage. It was submitted that 'consent' within the practice of ukuthwala was a concept that had to be determined in accordance with the rightful place which customary law had in our constitutional dispensation, because it was an integral part of ukuthwala that the 'bride' may not only be coerced, but would invariably pretend to object (in various ways), since it was required, or at least expected, of her to do so.

Held, that it was apparent from the expert evidence and the submissions of the amici that, because the trafficking and sexual assaults took place after the customary 'marriage', the offences for which the appellant was charged took place *after* a

'traditional' ukuthwala would have occurred. Therefore the appellant could not in any event have placed reliance on the practice of ukuthwala (in the traditional sense) as justification for his conduct. What he did, however, attempt to do was to rely on the aberrant form of ukuthwala as being the living form of customary law, to justify his conduct. (Paragraph [90] at 479*a*–*b*.)

Held, further, that the trial court had correctly found that the appellant had not asserted any customary law precept to have justified his conduct, or that he had acted in the belief that he had entered into a customary marriage that permitted sexual coercion. However, it could not be countenanced that the practices associated with the aberrant form of ukuthwala could secure protection under our law. The court could not therefore, even on the rather precarious ground of the assertion by the appellant of a belief in the aberrant form of ukuthwala as constituting the 'traditional' customs of his community, which led to a 'putative customary marriage,' find that he had neither trafficked the complainant for sexual purposes (as defined) nor committed the rapes without the necessary intention. The court could furthermore find no fault with the trial court's credibility findings, or with its reasoning and conclusions in respect of the convictions on both the trafficking and rape counts. (Paragraphs [92]–[96] at 479*f*–480*e*.)

2. S v LR 2015 (2) SACR 497 (GP)

A court's acceptance of a child's acknowledgement of guilt, without taking into account that the prosecutor had not agreed to diversion vitiates such an order of diversion.

The accused was a 16-year-old boy who was charged with culpable homicide. The offence arose out of his driving of a motor vehicle without a licence, overtaking two vehicles while it was unsafe to do so, and colliding head-on with a third vehicle, killing one of its occupants. His legal representative brought an application for the diversion of the matter in terms of s 69(1) of the Child Justice Act 75 of 2008. The application was opposed by the prosecutor, but the magistrate, after considering the defence's submissions and the probation officer's recommendation, ordered diversion of the matter for the accused to attend a life-skills programme.

Held, on review, that the presiding officer had misdirected himself by accepting the child's acknowledgement of responsibility for the offence without considering the provisions of s 52(1)*(e)* of the Act, in that the prosecutor had not given his assent to the diversion. In the circumstances the order had to be set aside and the matter referred to the child justice court for trial. (Paragraph [9] at 499*i*–501*b*.)

3. S v MGCWABE 2015 (2) SACR 517 (ECG)

If an accused's wife is being called as a prosecution witness she must be properly informed of her rights in terms of section 195 of the Criminal Procedure Act, 51 of 1977.

The appellant was a court clerk employed at a magistrates' court, who was convicted in that court of the theft of a police docket and the attempt to obstruct the course of justice by stealing the docket. He was sentenced to four years' imprisonment on each count, the sentences to be served concurrently. The third state witness at the trial was the appellant's estranged wife, who was not living with him at the time. She testified that she had been away for the weekend and was not aware that the appellant had slept at her home. On that Monday the appellant went to his wife and asked her for his bag, which was inside her house. He made repeated attempts to get the bag from her but she was unwilling to hand it over. The appellant even resorted to calling the police to accompany him in his quest to get the bag. After the appellant eventually left without having succeeded in his quest, his wife then called the police and handed over the bag to them. It contained the police docket. After testifying in chief, she stated under cross-examination that she was still married to the appellant and that it had not been explained to her that she did not have to come to court, but that she had decided that since she was already there, she might just as well testify. On appeal it was argued that the magistrate had committed a serious misdirection in failing to properly investigate the circumstances under which the appellant's wife testified and, at the very least, by permitting her to continue giving evidence after she had already indicated that she would not have testified, had she been aware that she was not obliged to do so.

Held, that the apparent view of the magistrate that because the marriage relationship between the appellant and his wife was 'severely damaged', she could be called to testify without being informed of her right to refuse to give evidence, was clearly incorrect. Section 195(1) of the CPA did not provide that a spouse would not be compellable to give evidence only if this were necessary to preserve the marriage relationship, but it afforded that spouse an absolute right to make an election not to testify. (Paragraph [12] at 522*d*.)

Held, further, that it did not assist the state that the appellant's wife elected to continue with her evidence after she had been made aware of the provisions of s 195(1). The decision to do so was taken because she was already in court and was not a decision taken after a proper consideration, before she was called as a witness. Where a witness was competent but not compellable, such witness should be informed by the prosecutor of his or her rights prior to them being called and this should also be placed on record at the outset of the proceedings. In any event the

presiding judicial officer should ascertain whether or not that witness was aware of the provisions of s 195(1) and if this were only brought to the attention of the witness for the first time at that stage, the judicial officer should afford the witness an opportunity to come to a decision after proper consideration. (Paragraph [16] at 523*b*.)

Held, further, that, as the magistrate had relied on the appellant's wife's evidence and the appellant had been cross-examined on his wife's evidence, in all the circumstances the convictions of the appellant could not be allowed to stand and had to be set aside. (Paragraphs [19] at 523*g* and [20] at 524*d*.)

From The Legal Journals

Stevens, G P & Lubaale, E C

“Behavioural science evidence in child sexual abuse prosecutions in South Africa: a jurisprudential and comparative insight.”

Obiter 2015 256

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

The judicial use of poetry[1]

While law is not poetry (although lawyers can be poetic) and poetry is not law (although as the poet Shelley would have it, 'poets are the unacknowledged legislators of the world'), law and poetry share an intriguing relationship. Edward Eberle and Bernhard Grossfeld ('Law and Poetry' 2006 *Roger Williams University Law Review* 353) state that:

> 'They have much in common…both are human creations of imagination and ingenuity, communicate their essence through language, provide order, form and structure to a dizzying array of phenomena present in daily life, and reflect and reshape the culture from which they arise. In these ways, law and poetry offer insight and understanding into the human condition.'

What follows is a short review of just one aspect of the interrelationship between poetry and law – the judicial use of poetic expression in judgments. It is evident that the main way in which poetry influences law is as a mode of expression, conveying the meaning or emotion of an issue or reinforcing through other word forms thoughts or ideas expressed in more traditional or legal language.

The use of poetry reflects our venerable legal sources. Thus there are examples of references to Roman poetry in our case law – in the 2015 Supreme Court of Appeal case of *S v Jwara* (2015 JDR 0593 at para [1]) Juvenal's *Satire* 6.346-348 is referred to for the well-known maxim *quis custodiet ipsos custodes*? ('who will guard the guards themselves?'). In the context of Roman-Dutch writers, a rhyme from Van Hasselt (*Annotationes ad Paroemias*) has been cited in the 1995 case of *Philips v Botha* (1995 (2) SACR 228 (W) at 244) to explain an illegal contract, and in *AB Wall's Marriage Bureau v Pienaar* (1986 (2) SA 165 (T)) the Roman-Dutch author Van Bynkershoek (*Quaestionum Juris Privati* book 2 ch 6) is cited on the evils of the marriage broker, including some lines from the poem *Pervigilium Veneris*, implying the practice fostered the procuring of illicit sex and adultery. And the Roman law maxim *pacta sunt servanda* is referred to by Willis J in *Botha v Botha* (2005 (5) SA 228 (W) at para [12]) as untranslatable into English:

[1] This contribution is partly based on a paper presented by the author at the Private Law and Social Justice Conference, held at Nelson Mandela Metropolitan University on 17-18 August 2015, entitled 'Law is like love…but is it like poetry? The relationship between poetry and law.'

> 'apart from the poetry of assonance, rhythm and rhyme, it is not possible to capture in an English translation the majestic grandeur of the declamation, pregnant with authority, imperative morality and foreboding if its injunction is disregarded.'

There are some cases in which a poem was the focus of proceedings. In *R v Webb* (1934 AD 493) the publication of what the appellant called a 'prose poem', about a nun who in an erotic hallucination had a vision in which she imagined that she had sexual intercourse with Jesus, gave rise to a conviction for blasphemy. The publication of a poem which was deemed to be an act likely to engender feelings of hostility toward the police resulted in a conviction for the publisher (*R v Haddon* 1965 (3) SA 532 (SRA)) and the poet (*R v Weiner* 1965 (3) SA 534 (SRA)) in erstwhile Rhodesia. In the rape case of *S v Van Wyk* (2000 (1) SACR 45 (C) at 51) the court used the complainant's poems to demonstrate the effect that the rape had on her.

On occasions a court may refer to a particular poem to metaphorically illustrate the aspects of the case. Hence the reference to the following lines of Tennyson's 'You Ask Me, Why, Tho' Ill At Ease' in *Trade Fairs and Promotions (Pty) Ltd v Thomson* (1984 (4) SA 177 (W) at 184) to illustrate the doctrine of *stare decisis* received from English law: 'A land of just and old renown, Where Freedom slowly broadens down, from precedent to precedent…'. Afrikaans poetry is also cited. In *S v Le Grange* (2007 JDR 0653 (NC) at 36) Kgomo JP refers ironically to the accused's failure to take responsibility for a callous murder when he refers to Jan FE Cilliers' poem *Trou*: 'Ek hou van 'n man wat sy man kan staan.' And in *Nordyk Properties (Pty) Ltd v Pieter Laubscher Construction CC* (2009 JDR 0492 (WCC) at para [45]) the court cites the first stanza of DJ Opperman's *Edms Bpk* in discussing assertion of control over property:

> 'Ek het 'n stukkie grond gekoop
> met melkhout op; dit afgekamp
> en teen die hek 'n naam geverf
> sodat verbygangers besef:
> Dis Dirk se erf.'

In *S v Zuma* (2006 (2) SACR 191 (W) at 223-224) the accused was upbraided by the judge for his reckless sexual conduct in not only having unprotected sex with someone who was not his regular partner, but in doing so with someone who was HIV positive, and then 'remedying' such conduct with a shower:

> 'Had Rudyard Kipling known of this case at the time he wrote his poem 'If', he might have added the following: "And if you can control your body and your sexual urges, then you are a man, my son.'

The Namibian Supreme Court turned interpreter of poetry in *Ex parte Attorney-General, Namibia: In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* (1995 (8) BCLR 1070 (NmS)). Citing part of WH Auden's 'Law, like Love' (at 1087) the court held that the image captured in the

following lines characterised the apartheid state: expedient, transient and ultimately self-serving:

> 'Law is neither wrong nor right
> Law is only crimes
> Punished by places and times
> Law is the clothes men wear
> Anytime, anywhere,
> Law is "Good morning" and "Good night."'

Lastly, in the Southern African context, we can refer to cases where the courts have referred to expressions derived from poetry. Nursery rhymes were characterised in *Hlophe v The Judicial Service Commission* (2009 JDR 0524 (GSJ) at 14n17) as being 'much beloved throughout the English-speaking world: by reason of their rhyme and rhythm they are easy to learn, improve vocabulary and often contain moral truths and political satire'. In *Law Society of the Cape of Good Hope v King* (1995 (2) SA 887 (C) at 895) the court referred to one Simon as 'as simple a soul as the children's rhyme would have him be'. Considerably less appropriate was the reference in *S v Ostilly and others (1)* (1977 (4) SA 699 (D) at 717), where the court referred to a number of charges during the trial falling away, 'rather like the nursery rhyme of the ten black youths'. We today may be more familiar with the version of the nursery rhyme that refers to 'green bottles'. In any event, though more acceptably phrased than the original rhyme, the racist nature of this entirely unnecessary comparison is completely unacceptable. In the *Hlophe* case (at 14), Willis J refers to 'Humpty Dumpty' in respect of an argument contended to be a 'knock-out blow' to the respondent's case ('All the kings horses and all the king's men could not put Humpty together again'.) Not only nursery rhymes but also drinking songs have found their way into the judgments of the courts – in *Phillips Central Cellars (Pvt) Ltd v Director of Customs and Excise* ([2000] JOL 6455 (ZH) at 1) a drinking song is quoted in extolling the virtues of 'music and rhyme' over abstemiousness. The misquotation from the poem 'Alumnus Football' by Grantland Rice is cited in *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* (2010 (6) SA 38 (GNP) at para [57]), where the court is making the point with reference to the type of gambling in question that it was simply not true that 'it matters not whether you won or lost but how you played the game' (The original words of the poem are: 'He writes – not that you won or lost – but how you played the Game.')

And then, finally, we have no fewer than *three* separate citations of the Scottish poet Robert Burns' 'To a Mouse' by Willis J (as he then was). Two of these relate to the same phrase: 'the best laid plans 'o mice an' men gang aft agley' (*Hannover Group Reinsurance (Pty) Ltd v Gungudoo* (2010 JDR 0983 (GSJ) at [6]; *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village* 2013 (1) SA 583 (GSJ) at [84]), and in the other (*Orion Real Estate Ltd v Cobra Watertech (Pty) Ltd* 2011 JDR 0186 (GSJ) at [12]) having characterised the applicant as 'like a mouse mesmerised by a cobra', in relation to the applicant's unjustified delays, Willis

J could not resist stating that there are limits to which the court can indulge a ‘wee, sleekit, cow’rin, tim’rous beastie’.

No South African judges have gone so far as to engage in judicial versification, that is, writing judgments in the form of verse. There are a few notable examples of this practice in the US courts however (for a fuller discussion, see John C Kleefeld (2010) 4(1) ‘From Brouhahas to Brehon Laws: Poetic Impulse in the Law’ *Law and Humanities* 21).

The *locus classicus* is *Fisher v Lowe* (122 Mich App 418, 333 NW 2d 67 (1983)), where the plaintiff sued for damages sustained to his oak tree when a car crashed into it. This is the judgment (per Gillis J for a full bench of the Michigan Court of Appeals):

> ‘We thought that we would never see
> A suit to compensate a tree
> A suit whose claim in tort is prest
> Upon a mangled tree’s behest;
> A tree whose battered trunk was prest
> Against a Chevy’s crumpled crest;
> A tree that faces each new day
> With bark and limb in disarray;
> A tree that may forever bear
> A lasting need for tender care.
> Flora lovers though we three,
> We must uphold the court’s decree.
> Affirmed.’

Only after the poetic judgment is there a footnote explaining that summary judgment was granted against the plaintiff because a no-fault statute excluded tort liability.

The appropriateness of delivering a judgment in verse was doubted by Zappala CJ of the Supreme Court of Pennsylvania in *Porreco v Porreco* 571 Pa 61, 811 A 2d 566 (2002), as reflecting poorly on the court (at A 2d 572, Pa 72). He was referring to a dissenting judgment delivered by Eakin J in the same case.

This was the context of the decision in the *Porreco* case: Louis Porreco, a mid-40’s millionaire, had courted 17-year-old Susan while she was still in high school, showering her with gifts – an apartment, a car, access to a credit card, fine jewellery, including, eventually, a diamond engagement ring. They married when Susan turned 19. Before the marriage, Louis had an ante-nuptial contract drawn up which specified that if they divorced Susan would get $3500 for each year of marriage in lieu of alimony, otherwise they would each keep their own property. The agreement reflected that her assets were $46 592, including the engagement ring valued at $21 000, whilst his totalled $ 3.3 million. When the marriage ended 10 years later,

she had the ring valued by a jeweller, who told her that in fact the gemstone was a zirconium and not a diamond. In the divorce proceedings she sought to have the ante-nuptial agreement set aside on the basis that Louis' misrepresentation had induced her to sign it. The decision of the trial court, and the Superior Court on appeal, was reversed by a majority decision by the Supreme Court of Pennsylvania, which held that fraudulent misrepresentation had not been established. This is Eakin J's separate dissenting judgment:

> 'A groom must expect matrimonial pandemonium
> when his spouse finds he's given her a cubic zirconium
> instead of a diamond in her engagement band,
> The one he said was worth twenty-one grand.
>
> Our deceiver would claim that when his bride relied
> on his claim of value, she was not justified
> for she should have appraised it; and surely she could have,
> but the question is whether a bride-to-be *would* have.
>
> The realities of the parties control the equation,
> and here they're not comparable in sophistication;
> The reasonableness of her reliance we just cannot gauge
> with a yardstick of equal experience and age.
>
> This must be remembered when applying the test
> by which the 'reasonable fiancée' is assessed.
> She was 19, he was nearly 30 years older;
> was it unreasonable for her to believe what he told her?
>
> Given their history and Pygmalion relation,
> I find her reliance was with justification.
> Given his accomplishment and given her youth,
> was it unjustifiable for her to think he told the truth?
>
> Or for every prenuptial, is it now a must
> that you treat your betrothed with presumptive mistrust?
> Do we mean that reliance on your beloved's representation
> is not justifiable, absent third party verification?
>
> Love, not suspicion, is the underlying foundation
> of parties entering the marital relation;
> Mistrust is not required, and should not be made a priority.
> Accordingly, I must depart from the reasoning of the majority.'

(Despite the success of Mr Porreco on the issue of fraudulent misrepresentation, Susan Porreco eventually prevailed, after the case was remanded to the trial court, on the basis of a different issue: that there had not been full and fair disclosure in the ante-nuptial agreement.)

Another example of the genre, is *Bailey v Mathers*, a decision of the Macomb County Circuit Court in the US state of Michigan, from 2003 (*DeAngelo Bailey v Marshall Bruce Mathers III aka Eminem Slim Shady* No 2001-3606-NO, October 17, 2003, Macomb County Circuit Court). The defendant, a rap artist, who went by the alliterative stage name of Eminem (standing for Marshall Mathers III), was sued for slander for alleging in graphic terms that Bailey had bullied him at school. Judge Servitto found for the defendant, for the following reasons: there was uncontested evidence of some form of assault by the plaintiff on the defendant at the time; that it had not been established that the song's lyrics were highly offensive when compared with these facts; that a reasonable person would not regard the song as stating actual facts about the plaintiff; and when the song was first released, it was established that the plaintiff had rather liked the ensuing attention (for a more detailed discussion, see John C Kleefeld 'Rhyme and Reason (sub nom The Dreadfullest Thing of All)'(2004) 62(1) *The Advocate* 351 at 352). The poetry was contained in a closing footnote to the judgment, laid down in a rap beat. Here is an extract from the judgment (at 13-14):

> 'Mr Bailey complains that his rap is trash
> So he's seeking compensation in the form of cash
> Bailey thinks he's entitled to some monetary gain
> Because Eminem used his name in vain
> Eminem says Bailey used to throw him around
> Beat him up in the john, shoved his face in the ground
> Eminem contends that his rap is protected
> By the rights guaranteed by the First Amendment
>
> Eminem maintains that the story is true
> And that Bailey beat him black and blue
> In the alternative he states the story is phony
> And that a reasonable person would think its baloney….
>
> So highly objectionable, it could not be
> - Bailey was happy to hear his name on a CD
>
> Bailey also admitted he was a bully in youth
> Which makes what Marshall said substantial truth
> This doctrine is a defense well known
> And renders Bailey's case substantially blown
>
> The lyrics are stories no one should take as fact
> They're an exaggeration of a childish act
> Any reasonable person could clearly see
> That the lyrics can only be hyperbole...'

As noted earlier, law and poetry have much in common: both are 'products of human ingenuity and imagination', both are 'human expressions of meaning', both 'reflect human personality and the human condition' (Eberle and Grossfeld op cit 367). It is hence perhaps not surprising to see poetic image informing and illuminating judicial

metaphor. To see examples of judicial versification in South Africa would truly be a surprise, however![2]

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[2] If readers are aware of any other examples of the judicial use of poetry, particularly in the South African context, I would be grateful for this information. My e-mail address is hoctors@ukzn.ac.za . Thanks!

Matters of Interest to Magistrates

Why magistrates matter and the role of the judiciary in the adjudication of environmental matters.

The Constitution.

The Constitution of our country provides unambiguously to any person the right to an environment that is not harmful to their health and well-being. The inclusion of an environmental right in Section 24 reflects international consensus that protection of the environment is a priority. The said enactment certainly has an enormous impact on environmental law enforcement. The way in which magistrates must make decisions have changed significantly since 1993.

Section 24(a) directs that people are entitled to an environment which does not impact negatively on their health whilst Section 24(b) imposes a direction on government to pass legislation in this regard.

The wider picture.

It was announced over a reputed TV station (specialising in environmental matters) recently that the ever ongoing pollution of the sea may just cause all the sea currents of the world to stagnate – a definite recipe for total disaster! A sea current takes about 100 years to complete one rotation around the world. Sea currents have a crystal clear effect on rainfall patterns and many other blueprints for environmental sustainability. The stagnation of our sea currents together with depletion of oxygen from the sea can positively devastate world climate and everything that goes along with that.

Why the concern.

Quite obviously wild life legislation should be taken seriously by the legal profession, because a failure to enforce such legislation with a resultant failure to punish wild life crime constitutes an infringement of the environmental right enshrined in the Constitution.

The eradication of our wild life can simply no longer be tolerated, but unfortunately our courts have the tendency to trivialise such crimes as individually isolated offences. The argument that the extraction of one or two small antelope does not matter when compared to shop lifting (because of the economic impact) does not

hold water! The unlawful killing of wild animals is happening at a rate which is unsustainable and which is threatening livelihoods and ecosystems.

Furthermore, the increasing costs of (for example) protecting rhino's need to be curtailed. Lions in Africa have already been reduced from 250,000 to a mere 25,000. The failure to curb these crimes will inevitably result in a very high price for society to bear. The so-called IDRC mission in their report titled Building a new South Africa – Environment confirmed *inter alia:* "contaminated water and disappearing fisheries will cost South Africa dearly over the next decades in terms of lost productivity and clean-up costs"

Dilapidation of the environment compromises the natural heritage and ecological integrity of planet Earth.

So what.

Who (or what) is going to do something in a vital effort to prevent degradation of our precious environment?

Let us move closer to our own situation.

Do you have clean water to drink? Do you breathe fresh air? Even more important – are your children on daily basis exposed to a safe playing environment? If you are unable to answer in the affirmative to any of these formidable questions your fate could be the result of environmental crime.

The role of magistrates.

It is a known fact that more than 90% of all court cases are adjudicated in the Magistrates Courts. There can be no doubt that magistrates (and their courts!) are charged with the responsibility to protect the environment, which includes wild life. And may it never be forgotten that protection of the environment is not simply about the saving of animals (particularly the rhino), plants and abalone (perlemoen). No, certainly not. It is moreover about protecting people's lives and their livelihoods.

Wild life crime is not something peculiar. It is just like any crime and it deserves the undivided attention and judicial skills of all the role players involved to the same extent as what a serious charge of robbery would require.

Taking into account the provisions of the National Environmental Management Act (NEMA), Act 107 of 1998 as well as a multitude of other Acts, environmental crime may be construed as any offence that harms the health and well-being of people, or harms the protection and conservation of the environment, the ecologically sustainable use of the environment or any offence that causes pollution or ecological degradation.

Environmental crimes are not committed only by fishermen who exceed their bag limit or by poachers unlawfully harvesting rhino for the perception that their horns

provide medicinal relief. Unfortunately these transgressions are usually the result of very meticulous business resolutions and they are aimed at filling the coffers of syndicates who could not care less about protecting the environment.

There are many examples of environmental crimes e.g the illegal dumping of hazardous waste, illegal deep – sea fishing, destruction of rain forests, smuggling of ivory or rhino horn, illegal developments, air pollution and water pollution. These are just a few events not being considered unlawful by a significant number of citizens, but which to the courts ought to be matters requiring serious intrusion and severe punishment within the ambit of what the law allows. They are no different from many other crimes in the sense that they also involve lying, cheating and stealing.

Environmental crime has very serious social and economic impact. The courts will as a result most certainly be derelict in their duties if they do not consider proper scrutiny of the critical facts before them. Only then will they be in a position to meet out appropriate penal measures catered for by the relevant legislation. And in doing so the courts will have to take note of the fact that, by harming the environment, the environmental criminal may very soon harm or kill the people, plants and animals who depend on the environment to survive.

Those who still perceive impairment of wildlife as “white collar” crimes (and therefore not important) must reconsider their own evaluation of these misdemeanours and account for the fact that the said contraventions are life-threatening and moreover costing the tax payer coffers full of money each year.

The Judiciary is often called upon to decide on issues related to cultural traditions. In judging cultural groups, magistrates have to acknowledge that offenders come from a certain cultural background, and that certain attributes are typical of a specific culture. Different back ground, different responses!

The problem is as wide as world cultures. Eastern beliefs about rhino horns as sex stimulant are good examples of what is construed with this statement. Greed and short sightedness cannot be excused and must aptly be dealt with so that the most hard core antagonist will shy away from committing such environmental crimes.

Even when people speak the same language, they do not always mean the same thing. We all suffer from preconceived ideas. Many think that what is there to their disposal today will also be there tomorrow. Fortunately the world is slowly awakening to reality. As a result the adjudicator on the bench will be seen as custodian and protector of our future.

Magistrates play a pivotal role in the adjudication of these matters. They are not simply referees who blow a whistle each and every time a rule of law is contravened. At the end of the day they have the distinct duty to see to it that justice is done, and this would *inter alia* entail, when they judge environmental crime, that they take cognisance of the fact:

- that environmental crime is very diversified;
- that there is mostly no clearly identified victim, and resultantly, there is a lack of reporting;
- that there is generally a lack of comprehension of the significance and inevitable importance of the variety of different types of plant and animal life in the world and more particularly in the iSimangaliso World Heritage Site.

Let us face it: there is generally a lack of respect for the environment, and most unfortunately this is also reflected in the (sometimes ridiculous) sentences imposed by our courts. Assaults, robberies, burglaries and a host of other crimes are considered much more important, because in those matters there are constantly individuals who suffered some kind of hardship whilst in the case of environmental crime only the environment was spoilt.

Unfortunately our legislature has also not yet seen the bright light indicative of the fact that, for example there can be no reason why bail applications in a murder charge is dealt with under Schedule 6 of the Criminal Procedure Act (requiring special circumstances as pre-requisite for the granting of bail) whilst the ruthless cold blooded killer of a rhinoceros may be granted bail randomly (almost willy nilly) under the far less stringent requirements of Schedule 1 of the said Act.

By and large magistrates must be sensitised about the objective of deterrence when they impose sentences. Additionally they should recognise the fact that a very few perpetrators of wild life crime are brought to book. And that is precisely why those who are apprehended and impeached should act as illustration to others who intend to commit similar crimes.

The prolonged effect of these crimes may not be ignored by the courts. Offences could be committed in our day, but it is quite possible that the impact of such delinquencies are not realised for generations afterwards e.g extinct bird life due to pollution and asbestos ingestion.

Many changes came about in South Africa in 1994. The Department of Environmental Affairs and Tourism (DEAT) joined this evolution and engineered programs whereby public participation in the formation of a national policy pertaining to the environment was promoted. This initiative was the forerunner to the enactment of the National Environmental Management Act, Act 107 of 1998 (NEMA)

This Act, although burdened with errors and oversight of important aspects (e.g the omission of certain penalty clauses), is a very useful instrument in the hands of the prosecution and the bench alike.

To a certain extent, the said Act combined Criminal and Civil Law. In addition to protracted terms of imprisonment and heavy fines, the NEMA provides that a

successful prosecution may result, without any noteworthy further ado, in the registration of a civil judgment against the offender:

- for loss incurred, which may include costs of rehabilitation of the damaged environment. See Section 34(1) of NEMA;
- for the cost of investigation of the crime;
- for the costs of the prosecution.

The NEMA goes a step further in that it provides for vicarious liability that may possibly be acquired by employers whose workers have committed environmental crimes. Magistrates all know that the Constitutional Court has not yet said the final word on the status of vicarious liability but that it was addressed creatively in State versus Coetzee 1997(1) SACR 299 (CC).

Furthermore a Court imposing a fine for a crime under the NEMA (or other environmental management Act) may order that a maximum of 25% of the fine be paid to the person whose evidence gave rise to the conviction. See Section 34B.

In a similar vein Section 34(3) provides that a Court which has convicted a person may assess the monetary value of any advantage gained by such person as result of the offence and, in addition to any punishment, order the award of damages or compensation or a fine equal to the assessed amount.

Upon perusal of NEMA it becomes evident that the crucial role of the judiciary is predestined. The role of the judiciary is emphasized for example in Section 34F(1) which provides that if a vessel or vehicle or aircraft is seized and is kept for purposes of criminal proceedings, the owner may at any time apply to the court for the release of such vehicle, vessel or aircraft.

The Act provides for the appointment of so-called EMI's (Environmental Management Inspectors). They have often in the press been referred to as "green scorpions". These inspectors should be properly trained. It is expected from them to provide valuable information to the courts in serious efforts to curb environmental crime.

In some circles it is seen as a stumbling block that none of these EMI's have been allotted the status of peace officers, and as a consequence they do not have all the powers bestowed upon peace officers. And of course, they may also not act as prosecutors. Magistrates have to make out for themselves whether these observable facts are indeed obstructions in the judicial arbitration of environmental cases.

The NEMA provides for rigid penalties, and the power of the courts is fortified by pronouncements of the higher courts. In the leading decision of Packerasammy v The State, Case 048/2003 A.D (28/11/07) the Appeal Court confirmed a sentence of 18 months imprisonment imposed upon a first offender who was convicted of the possession of 6140 perlemoen.

The institution of dedicated environmental courts a few years ago (e.g the one in Hermanus) were discontinued for reasons that neither the Judiciary nor the Prosecution understood. This deplorable state of affairs seems to have enlightened the powers to be - so much so that the Minister of Environmental Affairs has announced that specialised environmental courts were expected to come into operation soon.

Justice (and as such the Judiciary) is an equalizer of imbalances. Magistrates are important custodians *inter alia* of these imbalances. The importance of this balancing act can never be underestimated. Magistrates must see themselves as custodians of the future generation. This task can never be taken lightly, because our children and grandchildren will judge our actions today.

Protect the environment. Protect yourself and the ones you love. Fail the environment and you fail yourself.

Magistrates should urge in their judgments that people should maintain and embrace a lifestyle of simplicity, put less pressure on the environment and to be pro-active to the development of such lifestyle, firstly for himself but also for other people. They have a duty to make their voice heard against exploitation of natural resources and practices promoting climate change.

Heads of Court should engage into conversations with NGO's to promote protection of wild life and the environment at large.

Relevant Case Law.

There is limited criminal case law available. However, a significant number of reported civil cases may provide valuable guidelines on the adjudication of environmental matters in general. Some noteworthy cases are *BP South Africa v MEC for the Environment 2004 (5) Sa 124 (W); MEC for the Environment v Sasol Oil 2006(1) SA 66 (SCA); Fuel Retailers Association of SA v Director-General: Environmental Management. Mpumalanga 2007(6) SA 4 (CC).*

However, the following two criminal matters warrant mentioning:-

In the unreported matter of *Chu, Duc MANH v The State* the South Gauteng High Court on *13/3/2012 (A407/11)* Willis, J dealt with an appeal regarding sentence for the possession of 61 Kg rhino horn.

The learned Judge remarked *inter alia*: "…..at the moment, it looks as though the State is fighting a losing battle. Moreover, I believe that the Court may fairly take judicial notice of the fact that the whole issue of rhinoceros in South Africa has received much attention and the scale of the problem is most disturbing".

Willis, J continued saying: "It is utterly irrational that rhino should be hunted in the way that they are, and if rhinoceroses are eliminated from the face of the earth, how

long will it be before whales and dolphins are eliminated? How long is it before all that moves within the sea is eliminated and upon which we rely so much for our survival? How long is it before the habitats that sustain our being on the earth that provide us with the food from the earth are also lost? There is a deep sense within society that this kind of action, rhino' poaching, possess a threat to ourselves in the end". After discounting the fact that the accused spent 13 months in prison awaiting trial, the learned judge concluded that 10 years imprisonment was appropriate.

In *Lemthongthai v S* (849/2013) [2014] ZASCA 131 (25 September 2014) the Supreme Court of Appeal found that a sentence of 30 years imprisonment for fraudulently procuring permits to shoot and kill rhino for the ostensible purpose of trophy hunting, when in fact it was always intended to trade illegally in rhino horn, was too severe and replaced it with a sentence of 13 years imprisonment plus a fine of R1 million.

Louis Radyn

Retired magistrate

22 September 2015

A Last Thought

Human beings suffer,
They torture one another,
They get hurt and get hard.
No poem or play or song
Can fully right a wrong
Inflicted and endured.
The innocent in gaols
Beat on their bars together.
A hunger-striker's father
Stands in the graveyard dumb.
The police widow in veils
Faints at the funeral home.

History says, don't hope
On this side of the grave.
But then, once in a lifetime
The longed-for tidal wave
Of justice can rise up,
And hope and history rhyme.

So hope for a great sea-change
On the far side of revenge.
Believe that further shore
Is reachable from here.
Believe in miracles
And cures and healing wells.

Seamus Heaney (from "The Cure at Troy," 1990).